U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: JUN 2 5 2013 Office: NEBRASKA SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as an information technology company.[1] It seeks to employ the beneficiary permanently in the United States as a senior information security specialist, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[2] As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director denied the petition, finding that the petitioner had failed to establish the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's July 10, 2012 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

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[1] The AAO notes that on the federal tax returns submitted, the petitioner describes its business activity as employment services.

[2] Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation also states, "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted by DOL for processing on October 4, 2011. The prevailing wage or the proffered wage as stated on the ETA Form 9089 is $69,000 per year. The ETA Form 9089 indicates that the position requires all applicants including the beneficiary to have at a minimum a master's degree in engineering, computer science, information science, electrical engineering, or related field plus two years of work experience in an alternate occupation of information security specialist, network systems analyst, or information technology. The AAO agrees with the director's finding that, based on the evidence submitted, the beneficiary possessed the minimum requirements for the job offered prior to the priority date.[3]

To show that the petitioner has the ability to pay, counsel submitted copies of the following evidence:

- The petitioner's Internal Revenue Service (IRS) Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2010 and 2011;[4]
- The petitioner's financial statements (unaudited) for the year ended December 31, 2011 and as of May 31, 2012;
- The petitioner's accounts receivable report as of May 9, 2012;
- The petitioner's bank statements from December 2005 through June 2012;
- The petitioner's IRS Forms 941 Employer's Quarterly Federal Tax Return for the years 2011 and 2012; and
- Letters from the petitioner's banker stating that the petitioner has been approved a line of credit up to $450,000 since 2007.

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[3] The record contains evidence showing that the beneficiary earned a master's degree in electrical engineering from [redacted] in 2006. The letters of employment verification from the beneficiary's prior employers include name, address, and title of the writer and have a specific description of the duties performed by the beneficiary, in compliance with the regulations at 8 C.F.R. §§ 204.5(g)(1) and (l)(3)(ii)(A).

[4] The AAO notes that the petitioner's obligation to demonstrate the ability to pay starts from the priority date of October 4, 2011 onwards. For this reason, the AAO will only consider the petitioner's tax return for 2010 generally.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on January 1, 1997,[5] to currently employ 28 workers, and to have gross annual income of $4 million dollars.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[6]

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not employed the beneficiary during any relevant timeframe including the period from the priority date in October 2011 onwards. The petitioner in a letter dated May 9, 2012 stated, "This application is an offer of future employment and the Alien will be employed by us a full-time W-2 employee when his application has been approved."

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or

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[5] The record of the California Department of State, Corporations Division, shows that the petitioner was incorporated on November 9, 1998. *See* http://kepler.sos.ca.gov (accessed June 19, 2013).

[6] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The petitioner's tax return demonstrates its net income (loss) [7] for the year 2011, as shown below:

Tax Year	*Net Income (Loss)*	*Proffered Wage*
2011	$2,712	$69,000

Therefore, the petitioner did not have sufficient net income to pay the proffered wage in 2011.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[8] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's tax returns demonstrate its end-of-year net current assets for the year 2011, as shown below:

Tax Year	*Net Current Assets*	*Proffered Wage*
2011	$52,516	$69,000

Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in 2011. Based on the net income and net current asset analysis, the AAO agrees with the director that the petitioner does not have the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives legal permanent residence.

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[7] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2011) of Schedule K. *See* Instructions for Form 1120S, 2011 at http://www.irs.gov/pub/irs-prior/i1120s--2011.pdf (last accessed June 17, 2013) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). The petitioner's net income (loss) for 2011 is found on line 18 of schedule K.

[8] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On appeal, counsel urges the AAO to consider the balance available in the petitioner's bank statements. However, the petitioner's reliance on the balances in the petitioner's bank account is misplaced. Even though the regulation at 8 C.F.R. § 204.5(g)(2) allows USCIS to accept or the petitioner to submit additional evidence, such as bank statements, such evidence is supplementary in nature and does not replace or eliminate the requirement that the petitioner must file either federal tax returns, annual reports, or audited financial statements to establish the ability to pay. In the instant case, the petitioner has submitted its complete federal tax returns for 2011. No evidence, however, has been submitted to demonstrate that the figures reported in each of the petitioner's bank statement somehow reflects additional available funds that were not reflected on its tax return or in the cash entry on Schedule L.

Further, the bank statements only show balances in the petitioner's bank account in a particular time period. They do not explain how those balances can help the petitioner pay the proffered wage during the qualifying period from the priority date. Absent further explanation and evidence, the balances shown on the petitioner's bank statements do not reflect additional funds available to pay the proffered wage and are not evidence of the petitioner's ability to pay. Therefore, the AAO cannot accept any of the bank statements as evidence of the petitioner's ability to pay.

Similar to the bank statements, the accounts receivable reports that the petitioner prepared should be reflected on the tax return under Schedule L. Therefore, the AAO will not accept the petitioner's account receivable reports as evidence of the petitioner's ability to pay.

On appeal, counsel also urges the AAO to consider the line of credit extended to the petitioner by its banker as evidence of its ability to pay. The AAO declines to consider the petitioner's line of credit as evidence of the petitioner's ability to pay, because the record contains no business plan or audited cash flow statement to show that a line of credit would augment the petitioner's overall financial position. Nor does it include evidence to show that the line of credit or the loan was available at the time of filing the petition. There is also no indication in the record that the petitioner specifically borrowed money or obtained a line of credit to pay the beneficiary's wage. Thus, the petitioner's line of credit will not be considered as evidence of its ability to pay

With respect to the financial statements as evidence of the petitioner's ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2) is clear in that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements *must* be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. An unaudited financial statement consists of the unsupported assertions of management. In this case, the accountant's letter accompanying the statements of the balance sheet states that the certified public accountants "have not audited or reviewed the accompanying financial statements, and, accordingly, do not express an opinion or any other form of assurance on them."

On appeal, counsel also urges the AAO to consider the income of the owner of the petitioner as evidence of the petitioner's ability to pay. In a letter dated May 9, 2012 the petitioner wrote, "In addition, in order to avoid paying double tax, as a company and then again as individuals, both partners of the business draw a large salary to minimize additional tax liabilities."

USCIS has traditionally held that it may not "pierce the corporate veil" and look to the assets of the corporation's owners to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

In this case, however, counsel is not suggesting that the AAO examines the personal assets of the owners of the petitioner, but, rather, the financial flexibility that the owners have in setting their own salaries based on the profitability of their corporation. A review of the petitioner's tax returns shows that the two officers of the petitioner received a total of $510,848 in 2011 in compensation. Based on the available facts, the AAO determines that the officers' compensation are flexible and can be used as evidence of the petitioner's ability to pay the proffered wage.

Nevertheless, the record does not include any evidence to show whether either officer would be able and/or willing to forgo part or most of their compensation to pay the proffered wage of the beneficiary in 2011 and beyond. It is not clear, for instance, how many dependents the two officers supported in 2011, and how much they had to pay for their mortgage and monthly expenses. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Finally, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in

Sonegawa was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The AAO acknowledge that the petitioner has been in competitive business since 1998, and has employed somewhere between 26 and 30 employees in 2011 and 2012 (based on the IRS Forms 941 filed every quarter in 2011 and 2012). Unlike *Sonegawa*, however, the petitioner in this case has not provided any evidence reflecting the company's reputation or historical growth since its inception. Nor does it include any evidence or detailed explanation of its milestone achievements.

While it is not the basis for dismissal of the appeal here, the AAO notes that the petitioner has filed another employment-based petition in October 2011. The table below shows the details of the other petition filed by the petitioner:

Receipt Number	*Beneficiary's Last Name*	*Petition Received*	*Decision*	*Date Adjusted to LPR*[9]
		10/28/11	Approved	03/05/12

Consistent with 8 C.F.R. § 204.5(g)(2), the petitioner is, therefore, required (unless disputed) to establish the ability to pay the proffered wage of not only the current beneficiary but also of the other beneficiary listed above from the date of filing of each respective labor certification application until the date each beneficiary obtains lawful permanent residence, or until the petition filed is withdrawn, revoked, rejected, denied, or approved. In any future proceedings, the petitioner must address this issue and provide evidence of the ability to pay the proffered wages of both beneficiaries.

Assessing the totality of the circumstances in this individual case, the AAO determines that the petitioner has failed to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

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[9] LPR stands for Lawful Permanent Residence.